

What is Survey, Search and Seizure?

Survey means collection of facts and information. However, the word “**Survey**” has not been defined in Income Tax Act, 1961. There are no such circumstances specified for a survey to be conducted. The conducting of survey depends on the discretion of the officers of the Department. The objective of survey is to extract information. Thus, where the department is in need of information, a survey may be conducted u/s 133A of the Income Tax Act, 1961. As per the section 132 of the Income Tax Act, 1961, a search and seizure action can be undertaken against any person who is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed or would not be disclosed for the purpose of this Act (i.e. to unearth undisclosed income or property). The search and seizure action can also be taken when there is failure to produce books of accounts, documents etc. in respect of summons issued or notice issued under section 143(2) or u/s 131 of the Income Tax Act, 1961. A search is conducted in a very specific circumstances where the department has reasons to believe that one of the conditions of section 132(1) (a) to (c) are satisfied.

EFFECT OF LEGALITY OF SURVEY, SEARCH AND SEIZURE –

The survey, search and seizure operation can be held as illegal by courts but the information found in such actions can be used as evidence against the assessee.

It has been held in **Dr. Pratp Singh and Anr v. Director of Enforcement and Ors (1985)155 ITR 166 (SC)** that “*Illegality of a search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence is placed has to be cautious and circumspect in dealing with such material or evidence*”

The apex Court in **Pooran Mal v. DIT (1974) 93 ITR 505 (SC)** has also held that evidence obtained as a result of illegal search or seizure is not liable to be rejected.

In **CIT v. Kamal & Co. (2009) 308 ITR 129** the Hon'ble Rajasthan High Court has held that the revenue was entitled to use the material collected during the course of illegal survey.

VIOLATION OF HUMAN RIGHTS

The assessee can make complains to Human Rights authority if harassment is caused to the family during raids or survey. Very recently the human right commission has observed that continuing search without any break at odd hours and forcing the assessee and or his family members to remain awake was a torturers act. The Patna High Court in **CCIT v. State of Bihar, Through Chief Secretary (Rajendra Singh) (2012) 205 Taxman 232 / 71 DTR 268 / 250 CTR 304** upheld the decision of the human rights commission that interrogation till late night amounts to “torture” & violation of basic “human rights”.

PRESUMPTION –

S. 132(4A) provides that where a person is found to be in possession of any books of account,

documents, money, bullion, jewellery or any valuable article or thing during the course of search, then it may be presumed that :

- (a) such books and assets belong to such person,
- (b) the contents of such books and documents are true,
- (c) the books of account and documents are to be deemed to be in handwriting of the person and are deemed to be carrying such person's signature where they are signed as such.

Such presumption is available in search proceeding u/s 132 of the Income Tax Act, 1961 only. The Allahabad High Court in **Pushkar Narain Saraf v. CIT, 183 ITR 388** held that presumption arising u/s 132(4A) was available only in regard to and only in context of search and seizure. However the Karnataka High Court in the case of **CIT v. P. R. Metrani, HUF 251 ITR 244** has held that presumption u/s.132(4A) was available for passing any order under the Act and its applicability should not be restricted to S. 132(5) by any stretch of imagination.

No such presumption was allowed under this section in case of survey u/s 133A of the Income Tax Act, 1961. But after insertion of section 292C by Finance Act, 2007 with retrospective effect such presumption is also allowed in case of survey proceedings.

However, the presumption under this section is a rebuttable presumption. The onus to rebut the presumption would lie upon the person who is found in possession and control of the documents by adding evidence. It has been held by the Allahabad High Court in **Raj Pal Singh Ram Avatar (2007) 288 ITR 498** that where assessee has proved that the document did not belong to him, the amount mentioned in the said document are not assessable in the hands of assessee.

SEARCH AND SURVEY OPERATION ON A CA –

A question is generally raised whether a CA can be searched or surveyed? A CA can be surveyed or searched independently. One may note a very important **CBDT Instruction No. 7/2003 dt.30.07.2003**, whereby it was directed that search cannot be conducted against professionals of excellence unless there is compelling evidence and confirmation of substantial tax evasion. So at least, search on client cannot be a basis for search on C.A. Rigors of this Instruction can be applied to survey also.

One more question is generally raised that whether a CA can be surveyed in connection with survey or search made in his client's group. If the investigation wing has definite information that the CA helps his client in earning unaccounted income or bringing his unaccounted income in books by various methods, he can also be searched or surveyed. A CA cannot be surveyed or searched only because the authorizing officer suspect or has reason to believe that his books of accounts are lying in the office of CA. But if the assessee admits during recording of his statement that his books of accounts are lying in the office of his auditor, survey operation can be conducted in the office premises of the auditor.

As soon as the survey is conducted in the premises of the auditor, the investigation team should keep their investigation limited to the information, documents or books of accounts of the client in respect of which he has been surveyed. In **DIT (Inv.) v. S. R. Batliboi & Co. & Ors. (2009) 31 DTR 187 / 227 CTR 238 / (2010) 186 Taxman 350 (SC)** it has been held that it was open to the department to copy the data relating to the specified three entities of the assessee group from the two laptops which were seized from the possession of auditor of firm. Further, a direct **CBDT Circular No. 7D dt. 03.05.1967** stated that an IT-authority shall not enter the premises of the CA u/s. 133A for

inspecting the books of account of his clients. It may be noted that when the circular was issued section 133A (1) did not contain explanation whereby business premises could be extended to other places where books/ records are kept. However, the provision was amended subsequently to cover such other places also where books/ records could be kept. It is pertinent to note that even after the amendment, in **ITO Vs. U.K. Mahapatra & Co. 225 CTR 131 (SC)**, the said Circular was considered and relied on.

Further, in case, survey is conducted at premises of C.A., it should be limited only to the purpose for which survey has been extended.

Can a survey be converted into search?

This is rare, but it is possible. If in course of survey any information comes in to the possession of the department that the conditions for authorizing search exist, the department can initiate search operation subject to fulfillment of procedure thereof. The conditions are as follows:

Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that –

1. A person fails to produce books of accounts or other documents in response to notice u/s 131 of the Income Tax Act, 1961 or notice u/s 142(1) of the Income Tax Act, 1961. Or,
2. A person is in possession of any money, bullion or other valuable articles or things which are not disclosed in his return of income either partly or fully.

The survey proceedings u/s 133A can be converted into a search operation u/s 132 of the Income Tax Act, 1961.

If during the survey operation, information comes to the department which leads to formation of a reasonable belief that the conditions authorizing action u/s 132(1) exist, the department has right to take action u/s 132 – **Vinod Goel v. UOI [2001]252 ITR 29/118 Taxmann 690 (P&H)**.

However if the survey is converted into search without fulfillment of conditions precedent for initiating search or without application of mind or satisfaction by the higher authority eligible to initiate search then the search will be illegal – **Dr Nalini Mahajan vs DIT(Inv) (2002) 257 ITR 123**.

RECORDING OF STATEMENT –

The authorized officers under the Income Tax Act, 1961 are empowered to record statement during survey proceedings as well as search proceedings.

In case of search and seizure the statement u/s 132 is recorded under oath in case of survey statement u/s 133A is not recorded under oath. Statement u/s 132(4) has to be recorded after commencement of search but before the conclusion of the search.

The evidentiary value of statement recorded u/s 132(4) is very high since examination is on oath.

Statement during survey has no evidentiary value as held in **Paul Mathews & Sons (2003) 263 ITR 101 (Ker.)**. It was held that statement during survey does not give the same status of "evidence".

Section 132(2) specifically states that such statement can be used as "evidence in any proceedings under the Act."

RETRACTION OF STATEMENT –

The statement of a person recorded u/s 132(4) in case of search operation and u/s 133A in case of survey proceedings can be retracted. One may note that even statement u/s. 132(4) is not sacrosanct. It can be retracted, if it is not based on material. Circumstances in which the statement was taken, the fact whether it was retracted, how much time was taken to retract the statement, what evidences are available to retract, whether confession was done with/ without records, what pressure was exerted on the assessee, whether confession was based on erroneous knowledge of fact/ law are some of the relevant facts which would be considered.

The Apex Court in **Pullangode Rubber Produce Co. vs State Of Kerala And Anr. (1973) 91 ITR 18 (SC)** has observed that an admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect.

In **CIT v. Uttam Chand Jain (2010) 320 ITR 554 (Bom-HC)** the Hon'ble High Court has held that retracted confession can be relied only if there is independent and cogent evidence to corroborate the statement.

In the case of **ACIT v. Hukum Chand Jain (2010) 191 Taxman 319** the Hon'ble High Court at Chhattisgarh has held that the assessee has failed to discharge the onus of proving that confession made by him under section 132(4) was as a result of intimidation, duress and coercion or that the same made as a result of mistaken belief of law or facts.

SEIZURE AND IMPOUNDING –

In case of search and seizure operation, the authorized officer is allowed to seize any books of accounts, money, bullion, jewellery, or other valuable article or thing found as a result of search u/s132 (1)(iii) of the Income Tax Act, 1961, but in case of survey, the authorized officer can only impound the books of account and documents u/s133A(3)(ia) of the Income Tax Act, 1961.

A question is sometimes raised about the difference in impounding and seizure of books of accounts or documents. The dictionary meaning of impounding is placing private property in the custody of an officer of the law and dictionary meaning of search is the taking possession of something by legal process. Therefore, there is hardly much difference in impounding and seizure. However, there is difference of legal procedure for impounding and seizure in income tax act.

PRESENCE OF AUTHORIZED REPRESENTATIVE –

Whether an authorized representative, an Advocate or a Chartered Accountant is allowed to be present during the search or survey operation?

The Income Tax Act, 1961 does not mention about their presence during such action. However, as a matter of practice, normally during survey authorized representatives are allowed but during search action they are not allowed to be present. Even, if they are allowed, in reality, they should not interfere in the proceedings otherwise, they can be asked to leave the place during such operation.

CONCLUSION –

Survey, Search and Seizure operations should be handled very carefully. Due to ignorance of law and lack of experience, the assessee normally become fearful due to such operations and due to limited knowledge or wrong advice they do not face such actions properly and ultimately that results in heavy tax liability. The tax officers are normally decent and act within their rights and powers. However, the harassment and excess by the taxman cannot be denied during such operations. The person who is searched or surveyed should also extend full co-operation during such proceedings. Non-cooperation during survey and search action can cause further harm. Survey, Search and Seizure operation should be always handled by experienced and knowledgeable tax practitioner.

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